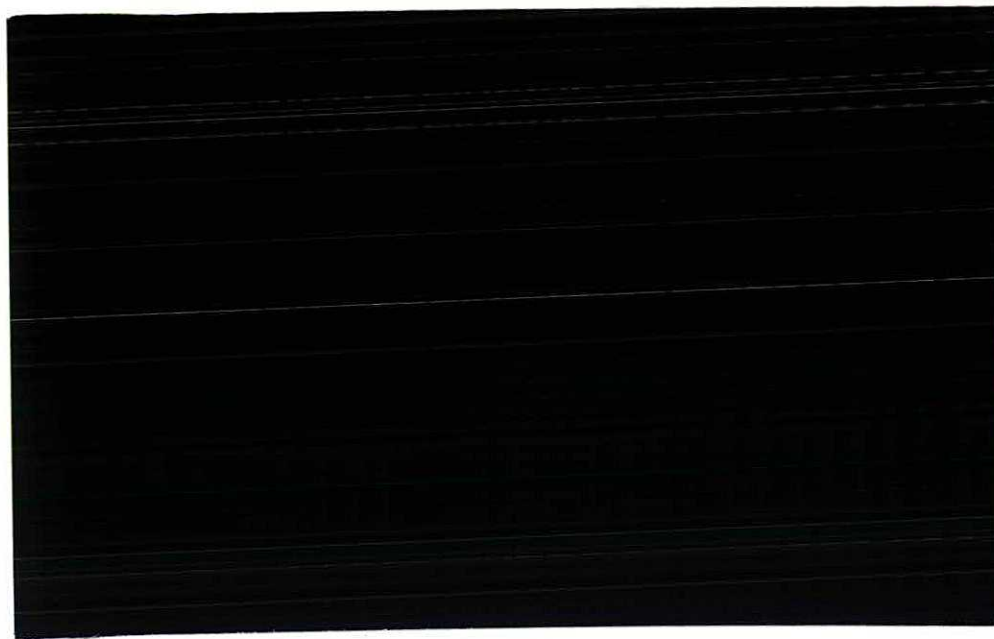




Institute of  
Hydrology

180/002



CONFIDENTIAL

REPORT ON A VISIT TO KENYA IN MAY,  
1980 BY DR. K. A. EDWARDS, DIRECTOR  
OF HYDROLOGY, INSTITUTE OF

Introduction:

The ODA Kenya Hydrology Project was originally conceived as a 3 x 3 man-year project aimed at establishing representative basins in the medium agricultural potential zone of Machakos, Kitui and Embu Districts of Kenya together with the subsequent preliminary analysis of data.

The project was based within the Ministry of Water, Development, Resources Branch, with back-up support from the Institute of Hydrology.

ODA limited the size of the proposed expatriate team to two on the grounds of economy and expressly forbade the ordering of equipment and vehicles until receipt of the formal approval of project personnel from Kenya Government even though there was a six-month waiting list for vehicles. These unforeseen delays in delivery of vehicles and equipment together with difficult and slow procurement procedures within Kenya Government limited the effectiveness of the project with the result that only the first objective was achieved by September, 1979.

Attempts were made to obtain an extension of the project but ODA, acting on the advice of the East Africa Development Division, refused to countenance such an extension in spite of vigorous Kenya Government representations. A second phase project was formulated, therefore, to function under the auspices of the EDF-funded Machakos Integrated Development Programme.

This second phase project was favourably received by the EEC and by the Engineering Consultants working on the MIDP. Administrative delays in finalising the contract and further cuts in the MIDP, however, led to the withdrawal of expatriate personnel from Kenya and the premature handing-over of the project to the Kenyan counterparts.

This report deals with the visit in May, 1980 of the former project leader to negotiate with the EEC Delegation, to discuss contractual problems with the consultants holding the existing MIDP contract and to ensure the handing-over process initiated by Mr. I. G. G. Hogg was continuing in the Ministry of Water Development.

Negotiations with the EEC Delegation

Attached to this report are copies of the draft Technical Assistance Contract and of correspondence between the EEC and the Institute of Hydrology on contractual difficulties. Also attached are comments made by NERC Contracts Section on the Special and General Provisions which would govern any contract entered into by the Institute and the Government of Kenya.

It can be seen from these documents that considerable difficulties were encountered in reaching common ground for

acceptance of the contract. Part of the brief of Dr. Edwards was to resolve some of the minor points and to discuss legal matters with either the British High Commission or their appointed legal representative.

Some progress was made towards agreement but the final out-come was determined by factors other than the contractual difficulties. One main factor was the decision to withdraw the services of Dr. Edwards from Kenya and to replace him by other Institute staff. This decision was taken in the light of considerable pressure by ODA and the East African Development Division to transfer Dr. Edwards from Kenya. In the event, the reaction of the EEC Delegation was predictable. They were anticipating contracting the services of someone intimately concerned with and experienced in the problems of Machakos District. The Agricultural Advisor, Mr. Bailly, was not prepared to proceed with the contract on the basis of a different officer being appointed. Mr. Arnold was prepared, however, to consider funding an alternative proposal under Lome II at a later stage (see minutes of meeting).

The second factor arose towards the end of the mission following the visit of the EEC Visiting Group to Kenya to assess progress on MIDP. Disappointed over progress, alarmed at the lack of coordination between the MIDP consultants and Kenya Government and forced to make some financial cuts, the visiting group recommended trimming MIDP and, in doing so, cancelling all peripheral activities including the proposed Hydrology Project.

Thus, in spite of the initial enthusiasm and support for the project it was doomed by "forces majeures" to fall by the wayside particularly since Mr. Bailly was also leaving Kenya in July and his successor would not take over until September.

#### Contractual Difficulties

The points raised by NERC's contracts section were accepted as being relevant and, indeed, similar objections had been made by other parties. None of the staff in the ODA section had enough knowledge of the General Conditions to comment on specific points that had been raised. Their attitude was largely that other people had accepted the Conditions and, since the penal clauses were most unlikely to be invoked, NERC should have accepted them as they stood.

This was also the attitude of the consulting engineers who held the existing contract for MIDP (Salzgitter). They had accepted the General Conditions knowing that they were unsatisfactory but aware that, if they wanted the job, they must accept a slight risk.

Clearly, had IH been able to proceed with the contract, NERC would have had to take a similar decision on this matter. Either we wanted the work and were prepared to underwrite a limited risk or we withdrew from such contracts.

With respect to specific legal points, the Commercial Section of the British High Commission were most helpful.

The consensus of opinion was that the Laws of Kenya were based almost entirely on British Law and that there would be little additional risk in being bound by the Laws of Kenya in any contract. This applies to most Commonwealth Countries.

#### Kenya Government's Attitude

Within the Ministry of Water Development, it was accepted that resources studies were an essential prerequisite of the large implementation programme. In common with other organisations, however, priority was almost always given to development project i.e. water supply, ignoring the cost - benefit arguments for adequate resources studied prior to large capital expenditure.

Under the new Head of Resources Branch, Mr. Kirori, more support had been forthcoming for basic resources work. Mr. Kirori strongly supported the continued presence of expatriate expertise in hydrology and wished to move the Kenya Hydrology Project or its successor into a newly-formed Research Section.

Physical support in the form of manpower and materials from Kenya Government had been most generous. The team working on the project was more than twenty men strong and it had been provided with one 4 x 4 lorry, a JCB excavator and a tipping lorry for the construction work and sediment work. The budget for running costs stood at Ksh300,000 per annum, which was adequate for most project activities except computing costs and expatriate emoluments.

The main achievements of the project up to September, 1979 were in establishing the team, in training the professional and sub-professional staff and in constructing the representative basins in the medium agricultural potential zone where little or no data base existed.

The second phase was intended to be an analysis phase although it was apparent that Kirori wished to expand the experimental work into other strategic areas. Arrangements had also been made to send the senior counterpart, Mr. Nyagua, on a post-graduate course to the U.K. which would lead to a serious lack of management at a critical time.

The problem of how to continue the work was central to the discussion between Dr. Edwards and staff of the Ministry of Water Development during the mission.

Given the possibility of the EEC contract, it was thought that two parallel programmes could have been managed until Mr. Nyagua's return to Kenya. Once it appeared that this was not possible, it remained to explore other alternatives, to maintain a watching brief on the project by means of short visits of three man-months per year.

ODA had agreed in principle. The arguments for this were based partly on economic savings, partly on the feeling of the Engineering Advisor of EADD that the Ministry of Water Develop-

ment should stand on its own feet and dispense with expatriate support and partly because ODA/EADD felt that the Institute of Hydrology had a vested interest in continuing their presence in Kenya.

A meeting between Mr. Kirori and Mr. Grievenson (Engineering Advisor for EADD) had failed to resolve this issue although it was abundantly clear that Mr. Kirori did not accept that the limited input of three man-months per annum was adequate even to continue the existing programme. When ODA refused to allow Mr. Mark Venn, the data processing consultant, to assist Mr. Hogg in assembling data already acquired by means of a short visit in late 1979 (on the grounds that the project was too near its end), the Ministry had good reason to suspect that ODA was pulling out prematurely and was only paying lip service to its commitment to continue.

### Conclusion

In the light of the difficulties outlined above, very little firm progress could be made. The Head of the Hydrology Section of MOWD, Mr. Charania, felt that he could not support an expansion of the experimental phase without analysis of data and appraisal of the results of the first phase. Project staff knew that insufficient data had been collected to allow a satisfactory analysis exercise. Mr. Kirori, looking to the future, wanted an expanding programme. ODA/EADD wished to limit the commitment severely and were prepared to pull out.

Mr. Charania, in addition, favoured submitting the EEC proposal to other donors for a later execution and was not necessarily committed to a continued reliance on the Institute of Hydrology.

It was agreed, finally, that Mr. Nyagua should continue his plans for an M.Sc. Course and that Mr. Kanyanjua (the second counterpart) should keep the data collection system operational until Mr. Nyagua's return. A further visit by Institute staff was agreed to in order to assess the data position and to assist with analysis. Future plans were left in abeyance until Mr. Nyagua's return or further developments with other donors.

Project equipment was formally handed over to Kenya Government with the exception of the Automatic Weather Stations which were technically on loan to Kenya Government. A decision on the disposal of the latter depends on the continued presence of the SIDA electronics technician in MOWD (who was assisting the Project) and on the decision taken by Resources Branch on the future of the project.

Dr. I. A. Edwards ..  
WALLINGFORD, AUGUST, 1980

ODA - KENYA HYDROLOGY PROJECT

VISIT BY DR. K. A. EDWARDS, MAY 1980 DIARY

MAY

- 5 London - Nairobi, arrive Nairobi
- 6 MOWD - briefing by Mr. Nyagua
- 7 MOWD - briefing by Mr. Nyagua, arranging meetings
- 8 MOWD - discussions with Mr. Kirori, Mr. Charania, EEC Delegation.
- 9 MOWD HQ - meeting with Mr. Shikwe, Deputy Secretary.
- 10 MOWD - disposal of equipment
- 12 AM, MOWD, EM, BHC, Commercial Section
- 13 Visit to MIDP, Machakos.
- 14 British Council, Scholarship of Mr. Nyagua, NEPD, Mr. Mule.
- 15 Salzgitter Consultants for MIDP, EEC Delegation
- 16 Inspection visit to Embu catchment.
- 17 MOWD - discussion with electronic technician.
- 19 AM, IPAL Project, Disposal of AMS, EM, IARI, 'Pondina' mission
- 20 MOWD - Accounts and Inventories
- 21 MOWD - Data store and archiving
- 22 Inspection visit to Kitui, Kitimui.
- 23 Inspection visit to Kitui, Kitimui
- 24 Inspection visit to Ngaa catchment, Machakos
- 26 Meeting with EEC Delegation
- 27 Report on EEC Meeting.
- 28 Discussions with Salzgitter and MOWD as to future.
- 29 Packing of office books and reports.
- 30 MOWD - technical discussion on work programme.
- 31 Final discussions with Mr. Kirori.

JUNE

2

BHC, Mr. Widgery, Air Freight Imprest A/C.

Final de-briefing eith Mr. Charania, Mr. Nyagua.

Depart Nbi - Bujumbura.

## KENYA HYDROLOGY PROJECT

Report of a meeting on Monday May 26th 1980 between representatives of the Institute of Hydrology, the EEC Delegation (Nairobi) and the EEC HQ (Brussels).

Venue: EEC Delegation 3.00 pm

### Preamble

Dr. Edwards, representing (IH/NERC), was charged negotiating a contract to be made between NERC and Kenya Government, with the funding agency EDF, represented by Mr. J. Bailly (Agriculture Advisor EEC Nbi) and Mr. Tom Arnold (Agricultural Development and Projects, EEC Brussels).

A provisional draft of the contract had been sent by Mr. Martin Marsters (IH) to EEC Nairobi and comments had been returned by Mr. Jesse (Delegate, EEC Nbi) (see attached copies).

At the same time the EDF General Conditions covering Technical Assistance Contracts had been sent to NERC Contracts Section for comment. A lengthy list of objections had been received from Mr. David Gray mainly concerning the unsatisfactory legal basis of the General Conditions.

A meeting was held at Wallingford on May 2nd 1980 between representatives of IM and NERC HQ. The conclusions of that meeting are appended. It was agreed that both the financial queries raised by the EEC and the legal queries raised by NERC should be discussed at the meeting to be held in Nairobi and which forms the substance of this report.

### Condensed summary of the points discussed

- 1) At the outset, Dr. Edwards explained that due to the objections to the contract raised by NERC and the recent edict requiring all such contracts to be referred to DES (ref. Proposals for carrying out work overseas by P.F.G. Twin, 30 April 1980 NERC Circular), he saw further delays in reaching a satisfactory conclusion to the contract.

Furthermore, it was now most unlikely that he would be in a position to act as Project Leader in the project under discussion and other IH staff would be appointed.



- 2) Mr. Bailly made the point most strongly that unless an officer was available before September 1980, there would be no benefit to the design engineers of MIDP who would be leaving in July 1981. Indeed, the whole point of the project proposal was to utilize the experience and expertise of an officer familiar with the hydrologic environment of Machakos District and he doubted whether such a substitution for Dr. Edwards was worthwhile to the EEC.

At the same time, in view of his imminent departure from Nairobi, it removed the difficult problem of reaching a speedy solution to the contract between GK and NERC. In his view, the project would have to be cancelled.

- ) Mr. Arnold asked whether a postponement of the project until Lome II and the arrival of Mr. Bailly's succession would not be a satisfactory solution, looking into the future longterm interests of Kenya rather than MIPD specifically.
- ) Mr. Bailly doubted whether a soil conservation project could readily be inserted into the Ministry of Water Development's programme at the expense of other commitments. Also there was a danger of the collapse of the team built up in the Water Department if both Dr. Edwards and the senior counterpart were absent (Mr. Nyagua is departing on an overseas M.Sc Course in September).
- ) Dr. Edwards suggested a compromise of splitting the existing project into two parts:
- a) the provision of technical guidelines and design data for the MIDP engineers and
  - b) the establishment of demonstration soil conservation works and the monitoring of increased water use i.e. decreased water yield associated with catchment conservation and restoration of vegetative cover.
- The first part could be covered by an immediate III contract and the second by either a contract under Lome II or by the Ministry of Water Development's own resources on an expanded time base.

- 6) Mr. Arnold queried whether an IH officer would be able to make a contribution significantly better than that of the MIDP's own engineers.
- ) Dr. Edwards replied that in such specialised field, professional hydrologists could early improve upon the present methods of estimation and that the design engineers did not have the time to analyse the results from the existing experimental catchment. Mr. Bailly agreed.
- 8) It was agreed that, after discussions with the Kenyan authorities, a shortened form of the project proposal would be submitted to Mr. Bailly by Dr. Edwards if Kenya Government agreed.
- 9) The discussion passed on to the legal aspects of the contract- Mr. Arnold informed the meeting that the EEC were currently re-drafting the General Conditions in the face of similar objections to those made by NERC. They suggested that NERC Contracts Section deal directly with a Mr. Michael Lake, DG VIII E 3 Brussels, who would welcome constructive suggestions.
- 10) On financial matters, Dr. Edwards referred to the insistence of the EEC that the fee rate should be calculated on the same basis as the previous ODA contract. He pointed out that such a contract would attract a higher rate of overheads because IH would be dealing entirely with the contract administration and because IH would incur extra expense such as insurance premium and a risk of having to replace staff at IH expense according to the General Conditions.

Mr. Arnold and Mr. Bailly replied that they had noted both in Brussels and Nairobi that the rates were high. This did not preclude their acceptance but clearly reduced IH's competitiveness.

Dr. Edwards made the point that the only way to reduce the fee would be to send out a less expensive officer i.e. less senior and with a smaller family. Mr. Bailly agreed that this was not worth doing if a specific officer were required and the rates would have to be accepted subject to the corrections suggested and a detailed breakdown of how the mission expenses were arrived at.

- 11) It was agreed that Mr. Arnold would contact Mr. McCulloch (Director IH) on return to Brussels to discuss the possibility of the compromise solution being adopted. Mr. Bailly expressed regret that after so much effort on Dr. Edwards' and his part, that a more satisfactory solution could not have been reached. Were NERC to accept the General Conditions as they stood, aligning the project with MIDP represented the quickest way of IH obtaining an EDF contract. If the proposal is delayed further, then the full weight of both bureaucracies could doubtlessly smother the project.

K.A.E.

Nairobi 27th May 1980

DELEGATION OF THE COMMISSION  
OF THE EUROPEAN COMMUNITIES  
IN THE REPUBLIC OF KENYA

THE DELEGATE

NAIROBI,  
National Bank Building, Harambee Av.  
P.O. Box 45119,  
Tel: 333592 Telex 22302  
Telegrams: DELEGFED - NAIROBI

Ref: JB/734

18th April 1980

Mr M W Marsters  
Institute of Hydrology  
Maclean Building  
Crowmarsh Gifford  
WALLINGFORD, OXON  
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from them practical recommendations for our purposes.

The Ministry of Water Development is - in and outside MIDP - obviously concerned with these recommendations for more realistic design criteria, in addition to having a wider interest with respect to hydrology.

Provisions have therefore been inserted to stress MIDP priorities and establish a much closer connection with MIDP Project.

I have not yet sent the Financial Schedule, as I have observations to make and clarification to receive on the following:

A. Personnel

- (i) The fee for the Project Leader should include the appropriate provision for mission expenses. We cannot in practice process such small expenses. An alternative is that the Government meets these expenses at its own rates.
- (ii) There cannot be either a separate item for backing-up of the Institute. This item has to be cancelled. The contract is with the Institute and incorporates the backing-up of the expert.
- (iii) The short-term specialist should not appear both under A and B, unless the duration of his services is already fixed, as it seems to be, as three months. If so, his qualification, the nature of and the need for his services should be spelled out from the beginning.

I have no clear idea on that and would appreciate being explained your detailed views.

If the so-called short-term specialist is rather a Consultant visiting Kenya upon request at times and for periods to be agreed beforehand, then his cost should be shown under B, with two items - passages (unit cost and estimated number) and daily allowance (rate and estimated number of days). The daily allowance should be a fixed lump sum, including salary, mission allowance and everything.

Please clarify the above.

B. Reimbursement with Supporting Documents

- (i) IV. Short-term specialist See above

....

(ii) V. Computing Services

It should be made clear whether or not computing services are expected to be actually required at regular intervals or even every month as provided for in your draft, or for specific purposes, at certain times, or both.

In the first alternative, it would be simpler to provide for a lump sum per year, which can then be considered as part of the Institute's backing-up services and as a result of the observation under A (ii) above, incorporated in the monthly fee of the expert.

In the second alternative, a unit cost should be stated, together with a justified estimate of the time required.

The third alternative is a combination of the first two.

(iii) VI Instrument repair

The provision is only for payment in £ Sterling. I would assume that some repairs can be effected in Kenya. If so, an estimated provision should be shown under both columns: payments in Sterling, payments in Shillings.

(iv) VII The purchase by you of climatological equipment, the detail of which is not listed, is subject to prior agreement of the list by Ministry of Water Development and myself, except if the purchase can wait until inclusion in and approval of the MIDP Annual Work Plans (1980/81 - 1981/82).

It is advisable to have already an indicative list of this equipment, so as to justify the K.Shs. 200,000 provision.

(v) VIII The same observation as above (IV) applies to various accessories for tractor./

C Costing

(i) Fees - in addition to observations under A above, it is felt that the fee for the project leader is high.

The fact that EDF is taking over from ODA should not

affect the rate, except for inflation, the charging of the whole year to 10 months, and the inclusion of back-up and mission costs, as requested. || X

With respect to the latter, it is not understood why mission expenses should be incurred in foreign currency, and a £ Sterling 1,060 monthly amount is simply not understandable either. ~

It is thought that the K.Shs.6,090 provision should come up in the first line against project leader, and it is supposed to cover all local expenditure in connection with the project leader, including mission expenses.

I therefore request you to reconsider the whole matter. It would be appreciated if you would give justifications for your proposed fees, including reference to the ODA agreement.

It should be made clear whether the fees are valid for one or two years.

(ii) There must be an error in respect of the rate of daily allowance under IV (ii), short term specialist. I assume that the intended figure was 65.

(iii) It would be convenient to have a table for the first year and another one for the second year. Same for Government contribution, if different from one year to the next.

(iv) Item VIII - Purchase of vehicles may be mentioned as it is, but with no costing, and only the mention per memory. This is not part of the contract.

EEC Nairobi should be substituted with Government/EDF.

(v) Total EEC contribution to be substituted with 'Total Estimated Amount'

There is no need for a contingency provision to be included in the contract amount.

(vi) The calculation of the K.Shs. amounts equivalent to Sterling pounds should be based on the current Commission's rate of exchange, which is at present:

1 European Unit of Account (EUA) = 0.6 Sterling pound = 10.33 Kenya shillings.

... 3 ...

I am looking forward to receiving your reply as soon  
as possible.

Yours sincerely

A handwritten signature in dark ink, appearing to be 'J-P JESSE', written over the typed name.

J-P JESSE





NATURAL ENVIRONMENT RESEARCH COUNCIL

Polaris House  
North Star Avenue  
SWINDON  
Wilts  
SN2 1EU

Telephone: Swindon (0793) 40101

Telex: 444293 (ENVRE.G)

Dr A Edwards  
Institute of Hydrology  
Maclean Building  
Crowmarsh Gifford  
WALLINGFORD  
Oxon OX10 8BB

Your Ref:

Our Ref: F3CR/82/C1/01

Date: 8 May 1980

1

Dear Dr Edwards

KENYA PROJECT

We had a very useful meeting on 2 May during which we mainly discussed my paper which raised several observations on the contract conditions. I did, however, explain that it may not have covered every point and with your experience you may well be able to identify other items which require attention. It also did not cover the financial side of the contract which was being dealt with separately by Mr Marsters and Mr Williams.

Before we considered the contract you explained that the General Provisions were based upon the EEC conditions of contract and it would not be possible to change these. The action to take would be to make amendments and additions to the Special Provisions which would override those parts of the General Conditions which we did not like. You also explained that you were returning to Kenya in the next week or so and that you would be able to have discussions with various officers out there to clarify and perhaps modify some of the points which we were going to raise. As there are references in the agreement to Kenya law, as well as actions by the Kenya Government, I suggested that you should show the contract, with our observations, to a lawyer nominated by the British Embassy in Kenya for his advice, both on the contract as a whole and the particular points being raised. You agreed to do this on your return to Kenya and to keep in touch with me on any developments.

A revised copy of the Special Provisions had recently been sent to you which was still to be looked at but as this mainly consisted of the operations side of the contract, this needs to be studied by yourself and accepted by IH.

As far as the General Provisions are concerned, we spent a long time going through this and I will now briefly try to summarise our conclusions.

Article 2.1

This covers risks of illness and accidents and you explained that the Kenya Government would not accept in the costings contingencies for costs arising from this item including air fares back to the UK. It would, therefore, be necessary to include in the overheads or, as we discussed, obtain a separate insurance cover for this particular item. Mr Williams has since found out from the British Council that they do take out a specific insurance for this type of risk and if NERC decides that it should insure, then it would appear that this could be done fairly easily.

2 -

Article 2-1, Paragraph 6

This covers the secrecy of information and IH are to decide whether they wish to have the rights of publication. You felt that the Kenya Government would not refuse a reasonable request to publish and, therefore, we should try to include a clause to this effect.

"In the event of the Contractor (NERC) wishing to publish any material for scientific purposes in the form of papers or reports (to be written by the Contractor or his staff) the Contractor shall, before such a report or paper is published, submit a draft thereof and the name of the publication in which it is to appear to the Government for approval, which approval will not be unreasonably withheld or delayed".

Article 2.2.1. Liability of the Contractor to the Government.

We agreed to try and cover in the Special Provisions our standard clause on consequential losses.

Paragraph 2

You are to try and obtain a definition of the "nature and extent of the duties entrusted to him by the Government".

Paragraph 3

You are to obtain an explanation as to what this means.

Article 2.2.2. Liability of the Contractor to third parties

This needs clearing with the lawyer.

Article 2.4

You noted the obligations here on IH.

Article 2.5. Replacement of staff at the Government's disposal

If the costings cannot cover this point then the insurance should.

Article 2.6. Orders of the Government

My revised wording should be included in the Special Provisions. Under the notification which has to be given within 15 days, we agreed a further amendment which would be "he must submit notice to the Government in writing within 15 days of receiving the order". We would also wish to have any order suspended during a period of objection. You were to follow this one up.

Article 3.1. Obligations of the Contractor's staff

Paragraph 3. You are to check this one out.

Article 3.3.

You are to find out more about this.

Article 3.4.3. Form and submission of reports

You wished to have six months for writing the final report, not the two months as stated.

Article 3.5. Training and trainees

You have noted the training commitment but this should not apply to visiting specialists.

Article 3.5. General behaviour and professional secrecy

You noted this obligation.

Article 4.5. Installation of Contractor's staff

You felt that the TA terms under which ODA sends staff abroad would be applicable here and either that or my suggested extract from the ADB contract should be applied.

Article 6.1 and Article 6.2. Conclusion of contract and date on which the contract becomes operative.

You are to look into this one as the contract should start when agreed but the one or two year period would commence when the employee arrives in the country.

Article 8.3

Were you to look into this further?

Article 9.1. Hours of work

You find this acceptable.

Article 9.2. Entitlement of leave

You saw no problem here.

Article 9.4

This was also acceptable.

Article 10.1. Non-performance of contract by Contractor

You are to follow through my suggestion with the introduction of the word "acceptable" in front of "written instructions from the Government". You also noted all the other obligations about non-performance. On the question of the 15 days submission though, I think it needs to be established still whether that refers to the submission by yourself in Kenya or from the UK.

Article 10.3. Damages for non-performance

You need to find out what the special damages would be as none are specified in the Special Provisions at the moment. The same applies to the reference of liquidated damages. You also noted the rules governing the concurrence of penalties for non-performance.

Article 11.3. Grounds for termination

There is a suggestion that we should cover items such as civil strife etc and you clear this with a lawyer.

Chapter 12. Settlement of disputes

From the EEC man in Kenya can you obtain a copy of the rules of arbitration for public contracts financed by the European Development Fund? We have, so far, been unsuccessful to get a copy from Brussels. There are also in the contract other international agreements mentioned and you may be able to obtain copies of those as well.

Article 11.2

Can you get more information on this from the lawyer as well.

I hope I have covered the points which we discussed and I hope you are going to be able to obtain clarification on further information once you get back into Kenya. I will look forward to hearing from you. Just for your information though, it may be necessary for me to hand over the day to day work on this contract now to either Mr O'Connor or Mr Bond in my Contracts Section if you cannot get hold of me any time.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'D Gray', is written above the printed name.

D Gray

Republic of Kenya  
Ministry of Economic Planning and Development

Contract amount:

Date of notification (1):

TECHNICAL ASSISTANCE CONTRACT

Finance

European Development Fund

Title (2)

Machakos Integrated Development Project  
(MIDP) Representative Basin Study

Accounting No.

4100.039.32.20

Consultant

Institute of Hydrology  
Natural Environment Research Council  
Maclean Building  
Crownmarch Gifford  
WALLINGFORD  
Oxon, UK

- (1) Date to be indicated by the Government
- (2) The title and accounting number must be quoted in all correspondence and on all payment documents

TECHNICAL ASSISTANCE CONTRACT

Between The Government of the Republic of Kenya  
represented by the Permanent Secretary, Ministry  
of Economic Planning and Development, hereafter  
called "The Government",

on the one hand

AND The Contractor "Natural Environment Research Council"  
Polaris House  
North Star Avenue  
Swindon  
Wilts, UK  
represented by the Institute of Hydrology,  
Maclean Building  
Crownmarsh Gifford  
WALLINGFORD  
Oxon, UK  
hereafter called "the Consultant",

on the other hand

THE FOLLOWING HAS BEEN CONCLUDED AND AGREED:

The Consultant will put at the disposal of the  
Government such technical assistance personnel as  
agreed between the parties to this contract, for  
the implementation of the Representative Basin  
Study within the Machakos Integrated Development  
Project (MIDP) in accordance with the following  
General and Special provisions.

## SPECIAL PROVISIONS

### Preliminary Remarks

- . The Special Provisions are intended to complete the specifications of the attached General Provisions, and where necessary, modify the latter.
- . The numbering of the articles of the Special Provisions is not consecutive and follows, with the exception of the present particular remarks, the number of the articles of the General Provisions.

## CHAPTER 2 OBLIGATIONS OF THE CONSULTANT

### Article 2.1 General Obligations

Within the general framework of the Machakos Integrated Development Project, the consultant will provide the required personnel and special services to undertake the Representative Basin Study outlined below in accordance with the General and Special Provisions of this contract.

The Technical Assistance personnel provided by the Consultant will be responsible to the Permanent Secretary, Ministry of Water Development, and, through him, to the Permanent Secretary, Ministry of Economic Planning and Development.

The terms of reference of the Representative Basin Study are as follows:

- . The Consultant will provide a technical assistance officer to act as Project Leader for the Government of Kenya Representative and Experimental Basin Programme Team in the Resources Division of the Ministry of Water Development.

The objectives so far of this programme are being

re-orientated towards the collection and progressive interpretation of data to be supplied to MIDP for:

- (i) the development of relevant water resources, and soil erosion, improved parameters and dam design criteria for small catchments.
- (ii) the development of improved soil and water conservation techniques.

The Consultant will continue assisting in experimental work already being undertaken by the Hydrology Section of the Ministry of Water Development in four existing catchments and undertake to analyse the data from these catchments, with a view to achieving the objective as stated under 2(i) above.

4. The Consultant will establish a demonstration catchment for soil and water conservation techniques within which rainfall, streamflow and sediment yield will be measured and undertake to analyse the data from this and other catchments with a view to achieving the objective as stated under 2 (ii) above.
5. The results of the analysis shall be presented in Technical Reports which
  - (i) will cover:
    - a. Rainfall intensity and erosivity
    - b. Streamflow, total runoff, streamflow coefficients
    - c. Storm runoff, peak flows, hydrograph analysis
    - d. Low flows, flow duration curves, safe yields
    - e. Rainfall/streamflow relationships
    - f. Sediment/streamflow relationships
    - g. Potential evaporation
    - h. Soil moisture balance and actual evaporation
    - i. Catchment water balance
    - j. Rainfall frequency (intensity) duration analyses
    - k. Regional analysis, and
  - (ii) will make practical recommendations in respect of the objectives 2(i) and (ii) above.



6. The study will also include the training of Kenyan counterparts to take over the management of the representative basins after the expiry of the study period.

The Consultant will provide technical back-up facilities including computer processing services and additional short-term specialists as required up to the limits set out in the financial schedule.

8. The Consultant will undertake to purchase, air freight, and supply at cost certain items of technical equipment as set out in the financial schedule.
9. The study is planned to be of two year duration.

### CHAPTER 3 DUTIES AND RESPONSIBILITIES OF THE PROJECT LEADER

#### Article 3.1 Nature of Duties

- i. The Project Leader will be located in the Resources Division of the Ministry of Water Development and he will direct counterpart and support staff to carry out all activities necessary for the completion of the tasks set out in the terms of reference in Article 2.1.
- ii. The Project Leader, will together with counterpart staff, draw up a specific two years' Work Programme designed to reach the objectives as set out in the terms of reference in Article 2.1. He will draw up before June each year an annual Work Programme, which will be part of the Annual Work Plan of MIDP.
- iii. He will liaise permanently and closely with the relevant MIDP technical staff, in particular the Senior Water Design Engineer and the Soil and Water Conservation Engineer, with special respect to the drawing up of Annual Work Programmes and the preparation of recommendations, as specified under 2.1.5 (ii) above.

The greatest attention will be given to the preparation

of the first Annual Work Programme which will be established in close cooperation with the MIDP staff. The Project Leader will take into account the comments made by this staff on draft Annual Work Programmes and technical reports as well as in the course of implementation of the study.

He will be expected, when requested by the Machakos Programme Officer, to attend meetings of the Machakos District Steering and Development Committees of MIDP.

### Article 3.4 Provision of Reports

#### 3.4.1. Interim and Special Reports

The Project Leader will, together with counterpart project staff, provide annually a report of the project's activities and achievements both technical and financial, and practical recommendations. The report, together with the annual work plan required in 3.1. above, will be examined jointly by the Government and the Commission, and form the basis for the agreement on the release of funds for the following year.

3.4.2. The interim reports, i.e. monthly brief progress report, and quarterly progress reports will be made for project and government use. They will be copied to the Machakos Programme Officer and their timing will be such as to coincide with that of the MIDP reports.

Quarterly reports will include recommendations for utilization by MIDP project, as the work proceeds.

Technical notes on specific points may be initiated by the Project Leader to meet MIDP requirements.

## CHAPTER 4 OBLIGATIONS OF THE GOVERNMENT

### Article 4.5 Installation of the Personnel of the Consultant

The Government will provide for the Project Leader:

(a) vehicles suitable for the various duties. It will

ensure that each vehicle is properly fuelled and maintained;

- (b) hard furnishings;
- (c) housing allowance;
- (d) complete office accommodation, facilities and staff;
- (e) counterpart and project staff as listed in the financial schedule.

## CHAPTER 5 DETERMINATION OF PRICES CURRENCY AND TERMS OF PAYMENT

### Article 5.1. Contract Amount

On the basis of unit costs, and quantities mentioned in Table 1, page 1, of these special provisions, the amount of the contract is estimated at:

### Article 5.4. Currency of Payment

The currencies in which payment will be made to the Consultant are defined in Table 1, page 1, (columns 4 and 5).

### Article 5.6. Terms of Payment

#### Article 5.6.1. Conditions and Frequency of Payment

- (a) The unit price of item I, Table 1, (a) will be paid upon submission of invoice at the end of the each month while the Project Leader is stationed in Kenya.
- (b) Items II, III, IV, V, VI and VII will be reimbursed upon the production of relevant supporting documents.
- (c) Any expenditure against items under B IV, V, VII, if not shown in the approved Annual Work Plan, is subject to prior agreement.

#### Article 5.6.3. Advances

In accordance with Article 5.6.3. of the General Provisions, it is agreed that an advance will be made to the Consultant of:

#### Article 5.6.5. Other Payments

In the case of taxes being paid, within the framework of this

contract, by the Consultant to the Government, either by way of fiscal tax on the Consultant's profits, or by personal taxation on the emoluments of the Consultant's personnel, such amounts will be detailed in a note (accompanied by appropriate documentation) from the Consultant to the Delegate of the Commission, who will forward it to the Commission.

#### Article 5.7. Bank Accounts

Payment will be made by transfer to bank accounts opened in the name of the Consultant

(a) to Bank for  
payment in

(b) to Bank for  
payment in

#### CHAPTER 6 CONCLUSION AND DURATION OF CONTRACT AND DATE ON WHICH IT BECOMES OPERATIVE

##### Article 6.3. Duration of Contract

(a) In principle the contract covers a period of 2 years. It is however agreed that the contract will be divided into two one-year contract periods.

#### Article 13.2 Addresses

The addresses for notifications relating to performance of this contract are:

<u>Government</u>	Ministry of Economic Planning and Development
<u>Consultant</u>	Institute of Hydrology Natural Environment Research Council Maclean Building Crowmarsh Gifford WALLINGFORD Oxon OX10 8BB U.K.

Commission of the European Communities

Directorate General for Development  
Directorate for Projects  
200 rue de La Loi  
B-1049 BRUXELLES  
Belgium

Delecate of the Commission of the European Communities

P O Box 45119, NAIROBI, Kenya

Paying Agent

- for payments in £ Sterling : The Commission (Brussels)
- for payments in K.Shillings: The Central Bank of Kenya  
P O Box 60000  
NAIROBI  
Kenya

Read and accepted  
THE CONSULTANT

Read and approved  
THE GOVERNMENT

Approved: THE EDF National  
Authorising Officer

Endorsed: The Delegate  
of the EEC Commission

## TECHNICAL ASSISTANCE CONTRACT WITH THE REPUBLIC OF KENYA

Machakos Integrated Development Project (MIDP) Representative Basin StudyAccounting number 4100.039.32.20

The contract offered is in two parts, Part 1 Special Provisions and Part 2 General Provisions. The funding for this project is from the European Development Fund and any contract has to be approved by the Commission of the European Communities. The general format of the Special and General Provisions indicates that it is based upon a standard EDF/EEC type contract, but the contract itself would be directly between NERC and the Republic of Kenya.

Payments would be authorised by the Kenya government but made directly from the EDF.

The Special Provisions refer specifically to this contract and are intended to complete the specifications of the General Provisions but they do, where necessary, modify the latter. Both the Special and General Provisions have been studied and I have the following comments.

1. Special Provisions

The consultant (NERC) is to provide a technical assistant officer to act as project leader for the project (Article 2.1). The study will be of two years duration with an appraisal after 18 months (Article 3.1). However, at the end of the first year the project leader will prepare a report which will be examined jointly by the government and the Commission and form the basis for the agreement on the release of funds for the following year (Article 3.4.1.2) but, in principle, the contract covers a period of one year (Article 6.3). The initial contract is, therefore, for one year with the expectation of an extension for a second year.

Article 2.1 gives the full terms of reference for the project and IH will have to agree if these are acceptable. Apart from work in Kenya the consultant has to provide technical back-up facilities, including computer processing services and additional short-term specialists as required, as well as undertaking to purchase, air freight and supply at cost certain items of technical equipment which have to be set out in the financial schedule. At Article 4.5 there is listed what the government will provide for the project leader and, again, IH will have to consider if this is sufficient.

2. General Provisions

This is a 38-page document and includes several clauses which are unacceptable as they stand and some require further information before they can be accepted and others depend upon the views of IH. In the Special Provisions, NERC are referred to as the consultant but in the General Provisions, contractor is used instead.

*Yes.*  
Article 2-1. "He shall cover staff employed by him in the performance of the contract against the risks of illness and accidents of whatever kind". The government ought to accept their responsibilities for negligence which have to be covered elsewhere in the contract but we should add here, "or loss caused by the negligence or default of the government or their representatives".

*\**  
In addition, as it appears to be a fixed price contract, NERC should include an element for expenses arising from illness or accident.

-2-

Article 2-1 Para 6. This refers to the need to maintain strictest secrecy in respect of the information, data and documents etc. Does NERC wish to have publication rights for scientific papers? If not, this clause is acceptable but it is, of course, a standard commercial type clause which I would expect.

Article 2.2.1. Liability of the contractor to the government. "The contractor is responsible for all damage caused to the government as a result of acts or omissions in respect of performance of the contract and which it is reasonable to attribute to negligence, error or omission". This, of course, is an open ended commitment but it is normal to accept responsibilities for our negligence. However, I would like to see included our standard clause, "The contractor shall not be liable for any consequential losses, damage or injuries arising from the involvement in this project, including the results of training activities".

Para 2. The extent of the contractors liability is dependent upon:

- (i) Whether or not the contractor prepared the studies for the project;
- (ii) The nature and the extent of the duties entrusted to him by the government.

Were IH in any way responsible for the studies of the project and the extent of the duties entrusted by the government should be those listed in the Special Provisions at Article 2.1 and 3.1, 3.4. As the Special Provisions modify the General Provisions, it should not therefore be necessary to expand this clause but, nonetheless, it might be better to add after "by the government", "as defined in the Special Provisions". IH should ensure that the terms of reference are adequately defined.

Para 3. "The contractor will bear the cost of modifications or corrections to documents prepared by himself without prejudice to compensation to the government for damages suffered." The costs here cannot be defined and if this clause were accepted an element would have to be included in the costings but in accepting this clause we are accepting that compensation to the government is accepted for any damages arising from the documents which subsequently need modifying or correcting.

Para 5. "After completion of the project the responsibilities of the contractor which are dependent upon the duties entrusted to him by the government are determined by the Special Provisions or the legislation of the Republic of Kenya. As the Special Provisions do not cover responsibilities after completion of the project, we cannot accept responsibility under unknown legislation of the government. However, the addition of the NERC clause disclaiming any responsibility for the project would overrule this if acceptable.

Para 6. "The liability of the contractor to the above provisions may be limited by the Special Provisions: in the absence of such limitation the financial responsibility of the contractor is limited to the amount of his remunerations." There is no provision in the Special Provisions but, whereas previously I looked at this as an open ended commitment for liabilities, there is a financial limitation which does not exceed the cost of the project.

Article 2.2.2. Liability of the contractor to the third parties

First paragraph. "The contractor shall be liable in Civil Law for any loss, damage or injury caused to third parties by any default attributable to his staff." The word "proven" should be added before "default".

49 Admin Second paragraph. "He hereby undertakes to bear all costs incurred by the government in respect of judgements pronounced in this connection." There is no limitation here on costs and this would, therefore, be an open-ended commitment.

Under the normal conditions of operation NERC could not expect to escape liability to third parties under the law once default has been proven. This would apply equally in this country for any of our activities.

Article 2-4. Installation of staff and equipment. The government has to approve the contractor's choice of staff which is normal and it should be noted that under 2-4.2 the contractor shall ensure that the approved employees are on site at the dates or within the periods stipulated by the Special Provisions of this contract (so far none have been provided) or, failing such, at the dates or within the periods communicated to the contractor by the government. The point to note here is that NERC must meet its obligations.

In Article 2-4-3 the contractor's staff must reside near their place of employment and the contractor must make the arrangements under 2-4-4 to supply and upkeep any equipment required by his staff.

2-4 above. Article 2-5. Replacement of staff at the government's disposal. If the contractor wishes to change staff, he must first seek the agreement of the government. If the contractor replaces any employee who proves unsuitable or who is prevented by accident or illness from carrying out these tasks, the contractor will bear the cost as well as expenses of the replacement. Therefore, costs should include an element to cover this.

Admin. Article 2-6. Orders of the government. The contractor shall comply with the orders given him by the government. This is very all embracing and even if we were to add after government, "where these are related directly to the contract", they could still be unacceptable. This one is very difficult to delete in full because it is not unnatural that the government would wish to have some control over the contractor but, in turn, it is difficult to make this a limiting clause. The word "reasonable" could certainly be added before orders.

It should be noted that if the contractor considers that an order exceeds his obligations under the contract, he must submit notice to the government in writing within 15 days on paying of losing the right to object. Unless the government orders otherwise execution of the administrative order shall not be suspended because of the objection. This again puts a lot of power into the hands of the government over the contractor. Therefore the reference to the administrative order not being suspended during a period of objection would have to be deleted and replaced with a clause allowing the order to be suspended because of the objection.

Article 3-1. Obligations of the contractor's staff. Nature of services.

Paragraph 3. If so requested by the government the contractor will carry out corrections, improvements and adaptations to studies and implementing plans which are necessary for the execution of the project. This is fine as long as it does not incur extra costs. Consider for the costing exercise. Therefore add to this paragraph, "in the event of any improvements, corrections and adaptations having an effect upon the services provided by NERC, these shall be costed as extra to the contract price".

Article 3-2. Powers delegated to the contractor's staff. "The powers delegated to the contractor's staff shall be laid down in the Special Provisions. Such powers may, where necessary, be specified in detail in a general administrative



order issued by the government. As long as the general administrative order is the same as the powers delegated within the Special Provisions and accepted at the time of signing the contract, then there should be no problems. This point may need watching.

*limit*  
*yes*  
Article 2-2. Conditions of supply services. "The staff put at the government disposal by the contractor shall comply with the Special Provisions, the general administrative order and a memorandum addressed to them by the government". We need to ensure that when accepting the Special Provisions the administrative order and the memorandum are the same.

Article 34-2. Form and submission of reports.

*KAE*  
*agrees*  
*super of*  
*not written*  
*\* KAE*  
*is seems*  
*open*  
*ended and*  
*it like*  
*t all*  
Third paragraph. This allows two months to write the final report. Is this acceptable?  
*in Kenya. Director right to answer?*

Article 3-5. Training and trainees. "The government requires the right to require the staff put at its disposal by the contractor to give instruction throughout the duration of the contract to trainees". "The number of trainees shall not exceed the number of employees put at the disposal of the government by the contractor". There are other points on this matter. The next relevant one really being, "The contractor shall not invoke the task of training to demand supplementary remuneration on any ground whatsoever". Therefore the costings should, if necessary, reflect this task.

*✓*  
Article 3-5. General behaviour and professional secrecy. This is really a repeat of 2-1, paragraph 6, on which comments have already been made.

*yes*  
Article 4-5. Installation of the contractor's staff. There are three very brief paragraphs here relating to the entry of the contractor's staff, families, equipment. This is not very detailed and I would prefer to see the extract from the Asian Development Bank contract which is attached which covers freedom from taxation and duties, privileges, exemptions, access to land. These are very detailed and seem to cover most points.

Chapter 5. Fixing of price, payments, methods and procedures. These are being attached separately, having been prepared by Mr Williams and Mr Butler.

*KAE*  
*on it we*  
*have a date*  
*which like*  
*most contracts*  
*concluded by agreement*  
*option of cost change? See 6.3*  
Article 6-1. Conclusion of contract. My interpretation of this clause is by conclusion. They mean at the time of agreement rather than at the end of the contract. However, if by conclusion they mean at the end of the contract the wording, "this contract shall be concluded after being approved by the Commission on the date on which it is notified to the contractor by the government", is unacceptable as it becomes open-ended.

*yes*  
*never*  
*is to be*  
*can will 2-5*  
Article 6-2. Date on which the contract becomes operative. "The contract shall become operative on the date when the first of the contractor's employees arrives on site in the Republic of Kenya. He shall not arrive on site earlier than the date of the order to begin providing services unless the Special Provisions provide otherwise". There is no date for arrival in the Special Provisions at the moment and if the contract only becomes operative on the date when the contractor's employees arrive on site, this should not prevent pre-arrival costs being included in the contract and what happens if, for any reason, the operatives do not arrive on site? Presumably all pre-arrival costs are forfeited. The contract should therefore be operative from the time of agreement but the period of one year commences on the arrival of the employee in the country

Article 6-2. Duration of the contract. The Special Provisions shall specify the duration of the contract but if the cooperation measure covers a number of years the parties shall be bound only in respect of the first contractual period. However, it goes on to say that save where one of the parties wishes to terminate the contract upon expiry of the contractual period, the contract shall be renewed by means of successive supplementary clauses, specifying the work to be carried out and remuneration of the contractor for the new contractual period. Pending approval and notification of the supplementary clause the contractor shall continue to be paid on the basis of the conditions laid down in respect of the previous contractual period. A party whose intention is not to renew the contract for the further contractual period must notify the other party no later than three months before expiry of the contractual period. All the above needs to be noted.

Article 7-1. Fiscal and custom arrangements. The fiscal and custom arrangements shall be the most favourable provisions granted to the Lomé Convention as granted to international organisations in the field of fiscal and custom arrangements. If this is to be applied instead of the suggested clauses put forward to cover customs dues, then we need to know what the Lomé Convention is.

#### Chapter 8. Cessation or postponement of performance of the contract.

Article 8-1. "Where the government orders the definitive cessation of performance of the contract, the latter shall be terminated immediately. The contractor shall be entitled to an indemnity for any loss, damage or injury which he may have suffered by reason of such termination." It might be safer here to add after "loss", "including financial".

Article 8-2. This covers postponement of the contract for more than 6 months, in which case, the contractor can rescind the contract and recover for loss, damage or injury. However, it should be noted that if the contractor wishes to rescind the contract under these terms, it must be done so by registered letter within 2 months of the date of receiving the administrative order postponing performance of the contract. The same applies to any requests under the indemnity which must be done by registered letter not later than 60 days after provision of the services has ended.

Article 8-3. This covers where the government orders postponement of the contract for less than 6 months. The same indemnity for loss, damage or injury applies but, again, there is a time limit of 60 days in which to submit a request. It should be noted here that whereas for postponements for more than 6 months the contractor can rescind the contract, for less than 6 months we cannot rescind the contract and although costs can be recovered if this is accepted as the part of the definition of loss, such financial losses are not defined and we may wish to recover return to UK air fares for the employee and family as well as <sup>other</sup> costs related to this period. It is to be noted also that NERC itself cannot rescind the contract for a period of less than 6 months.

#### Chapter 9. Hours of work, leave, travel, luggage.

Article 9-1. Hours of work. "The customs, laws and regulations of the ACP state and the exigencies of the service shall be taken into account when days and hours of work are laid down. The ACP states are the African, Caribbean and Pacific states which are recipients of aid from the European Development Fund. Before accepting any contract we know what these customs, laws and regulations are."

\* KAE  
minimal leave  
allowed for  
Article 9-2. Entitlement of staff for leave. Ex-patriot staff can have 5 days leave per month with the government deciding on date of departure on leave, bearing in mind the exigencies of the service and also that periods of employment shall not be less than 6 consecutive months. What about termination leave, what about local leave that cannot be taken? Is it possible to carry this over to the UK? Is this a matter to be concerned about?

AEG confirm  
they were  
Article 9-4. Transport of luggage of ex-patriot staff on taking up duties and on termination of employment. This lists the addition of weights that are authorised for the employee and members of family for travel by air etc. Are these acceptable to IH?

Chapter 10. Non-performance of contract. It needs to be noted here that some of the penalties for non-performance of the contract are severe and I will highlight these.

to Admin  
note section  
yes.  
Article 10-1. Non-performance of contract by contractor. Non-performance occurs when the services are not provided in accordance with the provisions of the contract and the contractor or his employees fail to comply with the written instructions from the government. This latter point was covered earlier on and I see this as a difficult one to accept. We might attempt to cover this by changing the wording of the second condition to read, "The contractor or his employees fail to comply with acceptable written instructions from the government

see 2.6  
Article 10-2. Establishment of non-performance. "Non-performance of the contract shall be established by means of an administrative order addressed to the contractor."

"This order shall constitute formal notice of obligation to remedy the non-performance."

"The contractor shall be obliged to submit the grounds for his defence to the government by registered letter within 15 days of the date of such notification. Failure to do so shall be deemed to constitute admission of the facts established

"The government shall, without delay, decide on the grounds admitted by the contractor and shall inform him of his decision by registered letter."

personal letter  
copy taken by  
hand for  
discussion  
The time limits here obviously need to be noted but I am not happy with the reference to registered letter as this restricts the means by which the defence can be put forward, eg a visit to the office or to the government etc to explain the situation or any submission in writing unless made by registered letter would make such submission of the defence null and void. Failure to use registered post would mean admission of the facts established by default. It also needs to be established here as to whether the time limit refers to the submission of defence by the employee in Kenya or from the UK.

the  
impression  
same earlier  
was prolonged  
contraction  
Although it is stated that the government shall without delay decide on the grounds submitted by the contractor, which is fine in terms of speed of answer, but it does mean that the decision lies solely with the government. There is, however, an arbitration clause later on.

yes  
it these  
are still subject  
to the earlier  
small limitation  
Article 10-3. Damages for non-performance. In the event of non-performance being decided under 10-3.1. special damages which are laid down for specific cases of non-performance are applied. These need to be specified in advance of signing the contract.

Article 10-3.2. refers to liquidated damages for delay in respect of any non-performance and are due without formal notice. Again, these need to be specified before accepting any contract. Indeed they may not be acceptable at all under any circumstances.

10-3-3. The amount and application of damages described in Articles 10-3.1 and 10-3.2 shall be determined by the Special Provisions. However, as these are not included in the Special Provisions and the Special Provisions are intended to modify the General Provisions, this is all left rather unsatisfactory.

10-3.4. and 10-3.4. Further penalties are termination of the contract by reason of fault on the part of the contractor and temporary or permanent exclusion from technical operation schemes.

Whereas it would be expected that NERC would not be in default of the contract, nevertheless, this part of it must be looked at it very seriously and considered whether acceptable.

Article 10-4. Rules governing concurrence of penalties for non-performance. These need to be read in conjunction with Article 10-3.

Article 10b - Claims and exceptional risks.

The Articles under this heading in turn need to be read with those mentioned previously.

This mainly covers the contractor obtaining an extension to the contract because of delays but not being entitled to an amendment to any of the contractual conditions unless the circumstances have occurred which the contractor could not reasonably foresee when the contract was concluded and in those circumstances the contractor is entitled to have the contract rescinded, otherwise, where circumstances do not make it impossible to complete the contract an extension to the contract can be agreed and/or an indemnity based on the injuries suffered or there would be an entitlement to the revision of the contract.

Article 10b-1.3. Again, introduction of registered letters comes into this with a time limit of 30 days. Previous comments apply. In Article 10b-1-4 claims by the contractor must under the penalty of being time-barred be made by registered letter with the following periods.

- a) to obtain an extension of the periods of performance or rescission of the contract before expiry of the contractual times, and
- b) to obtain an indemnity revision of the contract price or remission of liquidated damages for delay, no later than 60 days after the provision of the service has ended. However, in the event of error, omission, wrong or duplicated payment, and where Articles 5-9 claims must be made not later than 30 days.

Article 10b-2. Remission of damages for delay. This should be read in conjunction with the previous clauses and damages.

Chapter 11. Termination of the contract.

Article 11-2. The grounds for termination.

Third clause "any final, judicial decision of the court or tribunal of the Republic of Kenya which provides grounds for the termination of public contracts in accordance with the law of the Republic of Kenya". This is something under which we have no control and it would appear, no appeal. This looks like the sort of risk which one has to take in going into countries like Kenya. This is an unknown area though and is difficult to accept.

Article 11-3. This provides for settlement of sums outstanding under the contract in the event of termination but is solely on the basis of the services provided and accepted. There is no allowance for any form of compensation.

It should be noted here that apart from what already mentioned, the contractor has very little rights of termination. In very many UK contracts NERC has very strong rights of termination as follows:

"NERC shall have the power to determine the contract at any time by giving written notice to expire at the end of 30 days and upon expiration of the notice the contract shall be determined without prejudice to the rights of the parties accrued to the date of the termination. In the event of such notice being given, NERC shall be indemnified against any commitments, liabilities or expenditure which are reasonably and properly chargeable in connection with the contract."

Chapter 12. Settlement of disputes. This includes reference to the rules of arbitration for public contracts financed by the European Development Fund. We need to get details of this. It further goes on to say that no dispute may be submitted to arbitration until all administrative remedies, as laid down by the law of the Republic of Kenya, have been exhausted but such remedies shall be deemed to have been exhausted if no final decision has been taken by the government within a period of 4 months. It further goes on in Article 12-3 and as a transitional measure pending entry into force of the rules of arbitration any dispute shall be settled in accordance with the rules of conciliation and arbitration of the International Chamber of Commerce. Again, we must get more information.

Chapter 13. Miscellaneous provisions. This points out that the contract shall be performed in close contact with the Commission and goes on to specify when it should be informed and the number of copies which should be sent to it. I note that the EFC shall endorse the general administrative orders from the government to contract the staff provided for in Article 4-3, as well as endorsing administrative orders under Article 9-7. I note here that page 27 of the contract is missing which includes Article 9-7. It further says that there shall be present at all important meetings between the government and the contractor's staff when solutions to problems are discussed or finalised, particularly when they affect the cost of the contract or the investment.

CONCLUSION

As I said at the beginning, it is impossible to be definite on each of the clauses mentioned but some are not acceptable as they stand but might be after amendment. Some require clarification which may make them acceptable and others have to be looked at by IH who have knowledge of working in the area and have to implement the contract. Where further information is required and arbitration and other international agreements, I will get these for interpretation.

What is NERC's position about termination in cases of e.g. political strife etc. This clause under 11-3 would largely cover this for example

## ARTICLE IV

Undertakings of the Client

4.01

Freedom from Taxation and Duties

~~The Client warrants~~ that the Government of Republic of Kenya shall exempt the Consultant and the Personnel from ~~(or the Client shall bear the cost of)~~ any taxes, duties, fees, levies and other impositions imposed under the laws and regulations in effect in Republic of Kenya on the Consultant and the Personnel in respect of:

- (a) any payments made to the Consultant or the Personnel other than \_\_\_\_\_ nationals, in connection with the carrying out of the Services;
- (b) any equipment, materials and supplies brought into Republic of Kenya for the purpose of carrying out the Services and which, after having been brought into such territories, will be subsequently withdrawn therefrom;
- (c) any equipment imported for the purpose of carrying out the Services and paid for out of funds provided by the ~~Govt~~ <sup>Govt</sup> ~~Client~~ and which is treated as property of the ~~Client~~ <sup>Govt</sup>;
- (d) any property brought into Republic of Kenya by the

Consultant, the Personnel, or the dependents of the Personnel for their personal use or consumption and which will be consumed in R A K or will subsequently be withdrawn therefrom upon the departure of the Consultant and the Personnel from R A K.

Provided that

- (1) the Consultant and the Personnel and their families shall follow the usual customs procedures of the Government in importing property into R A K; and
- (2) if the Consultant or any of the Personnel or his family does not withdraw, but disposes of any property in R A K upon which custom duties and taxes have been exempted, the Consultant shall bear such custom duties and taxes in conformity with the regulations of the Government.

4.02

Other Privileges and Exemptions

~~The Client warrants that~~ the Government shall:

- (a) provide the Consultant and each of the Personnel with

work permits and such other documents as shall be necessary to enable them to perform the services;

- (b) arrange for the Personnel and, if appropriate, their families to be provided promptly with all necessary entry and exit visas, residence permits, exchange permits and travel documents required for their stay in R. J. K.;
- (c) facilitate clearance through customs of any property required for the Services and of the personal effects of the Personnel and their families;
- (d) issue to officials, agents and representatives of the Government all such instructions as may be necessary or appropriate for the prompt and effective implementation of the Services;
- (e) exempt the Consultant and the Personnel and any independent consultants or sub-contractors employed by the Consultant for the Services from any requirement to register or obtain any permit to practice the profession of <sup>Hydrologist</sup> ~~engineer or architect~~ or to establish himself either individually or as a corporate entity according to the laws of R. J. K..



4.03

Access to Land

The Client warrants that the Consultant shall have, free of charge, unimpeded access to all land in respect of which access is required for the performance of the Services. The Client will be responsible for any damage to such land or any property thereon resulting from such access (unless such damage is caused by the wilful default or negligence of the Consultant or the Personnel) and will indemnify the Consultant and each of the Personnel in respect of liability for any such damage.

4.04

Services, Facilities and Equipment

The Client shall make available to the Consultant and the Personnel, for the purposes of the Services and free of any charge, the services, facilities and property described in Appendix E.

ARTICLE V

Undertakings of the Consultant

Responsibilities of the Consultant

- (a) The Consultant shall carry out the Services with due diligence and efficiency and in conformity